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**Unpopular Justice: Law and the Inexpediency of Culture in North India**

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**Abstract:**

This paper is prompted by the recent spate of violence in north India instigated by khap panchayats, or caste councils, and the judicial and public outrage over the resurgence of an older form of popular justice. Though the current challenge to state's juridical authority bears an uncanny resemblance to a similar deadlock between caste-councils and state law witnessed in the same region nearly a hundred years ago, there are vital differences in the way distance from culture in law is accounted for by the colonial state and in postcolonial jurisprudence. In excavating the genealogy of the present impasse, the paper argues that at the heart of this deadlock is the unresolved nature of the culture question in postcolonial India, and its unanticipated and unrecognised effects. A counterfactual reading of two landmark pieces of legislation, the Hindu Marriage Act of 1955 and the Hindu Succession Act of 1956 goes beyond discovering the possibilities scripted by the new laws. The two Acts entail a comprehensive rewriting of the grammar of relationality in north India, and in doing so place new constraints on culture particularly in the domain of kinship. The conflicts they give rise to, such as the recent khap violence, cannot simply be understood by transposing insights from analogous

conflicts in Euro-American jurisprudence because of the unique nature of the public aspirations of law in India. The paper strongly argues for a shift in the language within which the relationship between law and culture is cast in order to gain any new purchase on one of the oldest debates in anthropology.

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## Introduction

*"[T]he people when they grew accustomed to new laws and new procedures did not retain their love for the panchayat [...] Courts of conciliation were no longer popular in the Punjab as soon as there were tribunals of another nature to which men could turn, and they are not likely to be successful again in the future as they do not appear [...] to be suited to the character of the people. A suitor does not wish to agree with his adversary, but to get the better of him if he can." (Sir Robert Egerton, Secretary to the Government of India, 17<sup>th</sup> September 1880)<sup>i</sup>*

In recent years, India has seen a renewed conflict between its new laws and its older forms and forums of justice, sometimes resulting in acts of gross violence and inhumanity. One of the most spectacular of these conflicts has been the challenge posed by the rise of violence perpetrated at the behest of caste councils as a form of blood justice. In recent years these caste councils have focused almost entirely on policing the boundaries of matrimonial alliances and have successfully handed out violent retribution to those who have married across the caste/dalit divide, or indeed within proscribed degrees of lineal separation. This runaway form of justice and its efficaciousness gained predictable opprobrium and unprecedented support in equal measure in media and scholarly attention [See Dogra 2013; Baxi, et al ??]. This paper is prompted by the rise of khap panchayats and this older form and forum of justice in recent years to investigate an long standing problem in modern India – that between law and culture.

Khap panchayats are local bodies composed of caste elders that have been traditional forums of justice in north India that adjudicate on local and domestic disputes. Each major sub-lineal exogamous group has a khap (or a representative body formed of its elder males). In many ways, thus khaps can also be seen as a technology to make visible

the cartography of alliance among middle-castes in the region. they have become extremely a

In March 2010, a Sessions Court in Karnal, Haryana awarded the death penalty to five persons for the murder of Manoj (23 years) and Babli (19 years) in 2007. Manoj and Babli had been brutally killed by their kin at the orders of a *khap* panchayat (or a council of caste elders) for marrying within the same gotra or sub-caste.<sup>ii</sup> The Karnal court passed the death-sentence for five members of Babli's family for carrying out the murders, and a life sentence for the head of the *khap panchayat* who had ordered the killings (Sharma 2010).

The court judgement and the ensuing meeting in Kurukshetra were new salvos from two old foes in a bid to break out of a deadlock that had been festering for more than two years. In the course of this time, a growing number of young men and women have been killed by their kin at the behest of similar diktats issued by caste-elders as retribution against mis-marriages between men and women either of the same gotra (lineal sub-caste), and/or village, or across the dalit divide. Through the Karnal court judgement, the state had finally showed a categorical sign of disapprobation for this form of runaway justice. The Kurukshetra meeting proved to be so popular so that in the next few months, several such congregations were convened. Here, thousands of ordinary and not-so-ordinary men and women from across the north Indian plains gathered as members or supporters of caste-councils, giving further evidence to the growing unassailability of these khaps.

Both the killings of young men and women and the supporting congregations or *khap-mahapanchayats* attracted a fair deal of media frenzy and have become the subject of growing scholarly attention (eg. Baxi, Rai and Ali 2006; Chowdhry 2007; Kaur 2010). In a curious development, the spate of murders gave to the swift import of the appellation

of 'honour killings' in media and popular representations. This was perhaps as a nod to the global imaginary in which India exists not only as a dominant economic player, but also one in which India too is plagued by the same irritant as its global comrades – that is, by certain lumpy bits of culture, not those that make for 'heritage' but those that ostensibly lead to clashes of civilisational proportions.

Culture in this instance was identified with caste and scholarly, journalistic and civil society attention elaborated on the underlying caste and gender dynamics that inform this brutal form of popular justice in north India (Baxi, et al 2006; Dogra 2010; Kaur 2010; Reddy 2010). In most of these accounts, the persistence of an older jurisprudence was seen to be epiphenomenal of an underlying obduracy of a region to become 'progressive' and its inability to inculcate desired social reform (Reddy 2010). Commenting on the phenomenon in the national press, historian Prem Chowdhry said, '[y]ou cannot do away with [khaps] because they are old institutions, but I would suggest that they take the reformist agenda (sic) [...] *khaps have to reform*', highlighting at once the reading of the situation even by the regional expert through a premium of change (Reddy 2010; emphasis added). This was particularly curious given that Chowdhry has herself noted the shifting interests of the khaps in the course of the last century, including their once patently reformist concerns such as opprobrium against lavish expenditures at weddings and/or demands for exorbitant dowry.

'After Independence, different cases and got panchayats held in different villages and several khap and sarv-khap panchayats of different caste groups have been making similar attempts to curb [dowry, and lavish expenditure on weddings]. Several resolutions have been passed imposing heavy fines (as high as Rs 11,000) on all those breaking traditional norms and excommunicating them. All these have proved fruitless. The so-called biradari leaders, who think it a matter

of pride and status to spend lavishly at marriages, have not observed such decisions. (Chowdhry 2007: 260)

She further observes,

It is significant that in the colonial period these [...] leaders had activated caste reform movement in their move towards upward mobility. In the postcolonial period, the same affluent groups are apparently still theoretically committed to purging the worst social abuses.' (Chowdhry 2007: 260-61)

For Chowdhry, reform is merely a matter of political expediency. In the 2010 interview, she argues that khap leaders have abandoned the reformist agenda because it no longer brings any political purchase for them. She reads their adoption of stricter observance of caste strictures as an expeditious route to influencing popular sentiment 'because it's an emotive issue on which they can mobilise' (Reddy 2010). However, no explanation is needed either by the interviewer nor indeed offered by Chowdhry, as to how or why stricture has come to entail an emotional appeal for some in north India.

As is evident from the trajectory of the concerns outlined by Chowdhry, the rise of khaps in the last few years is not due to an obduracy of a culture that refuses to change – were that to be true for any culture. Rather, the recent ascendance of khaps and their efficacious violence is precisely a result of a tectonic shift in local society and culture, none of which was either cognised or anticipated. The clue to this shift lies in the choice of adversary singled out by the khaps. Caste patriarchs had not identified romantic love, nor indeed individual choice as the root-cause of their outrage, as has been hastily (and erroneously) surmised by commentators and critics. In specifying the Hindu Marriage Act (1955), and in specific the sub-clause pertaining to the same-gotra (sub-lineage)

marriage, these councils have declared *substantive state law* as their direct adversary, indicting it for making possibilities that were not scripted within culture.

The state on its part made it amply clear that it was in not going to entertain this demand for amendment to the Hindu Marriage Act, not least because its unwillingness to share its juridical authority, even if it made for political discomfort. Mirroring the actions of the khaps, the state too handed death sentences to those who were seen to dispute its juridical supremacy, in this case Manoj and Babli's killers. Thus, an old battle between law and culture has once again been stoked. Its vintage however has trapped the current debate in familiar and rehearsed domains, both from within (for example, in comparisons with the battle between tradition and modernity in colonial law), and without (as exemplified in terming the murders as 'honour killings'). These inferences are not wrong in themselves; however, in order to enable a reframing of the relationship between law and culture that does not repeat older epistemological disadvantages, it is imperative to move away from legacy understandings.

### **Law's culture**

The contest between cultural and legal norms is not unique to India, and in fact forms the bedrock of identity politics that scholars from divergent traditions and persuasion have written about extensively.<sup>iii</sup> Whilst the inseparability of law from culture is undisputed, there remain significant differences in how the relationship is understood and explained in different contexts. Euro-Americanist social-legal scholarship tends to subsume the two into one on the grounds of a purported consensus between law and culture, in that law is but a codification and reinscription of everyday values, life-ways, or in other words, culture (Merry 1990: 62; Ewick and Silbey 1998: 43; Mezey 2001: 36;



Sarat and Simon 2003; Silbey 2005: 332). The tension between the two domains is acknowledged and understood by some to originate in the force of state power behind law (Derrida 1990; Peletz 2002; Supiot 2007). This tension gains new life-form every now and then, and its most recent manifestations have been the debates surrounding the illegalisation of the head-scarf in France (Scott 2008; Sunder 2003), or the conflict between notions of human rights and certain cultural practices, eg. female circumcision amongst certain African communities living in Europe (Benhabib 2005; Merry 2006). In these accounts, the gap between law and culture in the Euro-American context is sourced to cultural heterogeneity that has arisen from the fact of immigration. That is to say, normative difference is understood to emerge, if not lie outside of society.

The scholarship on the relationship between law and culture in Euro-America, whilst important and insightful, is ultimately of limited use in understanding the relationship between culture and law in India for two reasons in the main: first, because unlike Euro-American law, it is arguable to what extent state law in India draws on everyday social values. In fact, it may be more accurate to say that in India, legal and cultural norms far from coincide. Therefore, the subject of law and that of culture broadly defined often appear in contradistinction with each other. The relationship between the two is not necessarily, or always, one of hostility. Rather, as the quote at the beginning of the paper well illustrates, the public aspirations of law in India are aimed at attaining the eventual coincidence of the two in the future. Secondly, the source of heterogeneity between cultural and legal norms in most multicultural states in Euro-America is seen to be located in an externality or a separation achieved in the fact of either settler colonialism (eg. Aborigine rights in Australia, First Nations theory in North America)<sup>iv</sup>, or through immigration (most work on Islamic radicalism ranging from the Salman Rushdie fatwa to the illegality of the headscarf in France)<sup>v</sup>. Therefore, it is minimally plausible in these

contexts to constitute 'culture' as a problem, when culture stands in as shorthand for normative heterogeneity. In India however, cultural difference is seen intrinsic to the self-image of society in India. 'Unity In Diversity' is the most oft repeated state slogan and it is law that is seen to have the position of the émigré.<sup>vi</sup>

This distinctive nature of the relationship between law and culture in India has thus far been inadequately explored. Situations such as the current détente between the khaps and the state judiciary tend to become natural citizens of 'analytical subcultures' (Strathern 1981: 670) such as legal pluralism, and often fall prey to our habits of thinking about these domains. Through a counterfactual reading of the relationship between law and culture in contemporary India, I want to explore the constitution of culture as a problem, an impediment in the work of law, in two distinct moments in north India and its implications for understanding cultural and legal subjectivity in India today.

## **Recognition**

The current conflict between state law and popular justice bears an uncanny resemblance to a contest the region witnessed through the second half of the 19<sup>th</sup> century. The north Indian plains posed a special problem to the colonial state with respect to the question of law, both in terms of the rules by which people lived their lives as well as the processes and in particular institutions for dispute settlement. For the best part of fifty years following the annexation of Punjab in 1846, the then colonial state vacillated on how to contain the influence of local councils and custom and gain force and authority behind its own laws (Kapila 2003). From 1846 to 1899, the colonial government in Punjab went back and forth on the legal recognition of local juridical institutions, or village panchayats. These councils of village elders adjudicated on local

disputes, but in places the role of the panchayats was more varied so that they were also responsible for collecting and keeping important non-revenue records. In the hill districts of Kangra and Kulu, for example, specialist councils maintained records of marriage payments, and whose approval was necessary in the annulment of marriages, and in transfer payments (*harjana*) in the case of remarriage of women, etc.<sup>vii</sup>. The colonial state viewed the panchayats with great scepticism, but as I explain below, for a host of reasons found it difficult to either ignore them or get rid of them altogether.

The process of instituting any credible form of colonial legal government in the region was long-drawn out, one which both tested and at the same time helped to articulate the state's disposition towards the culture-question. When Punjab was first annexed in 1846, in a move to signal the advent of the new regime, all panchayats were summarily made illegal across the province, and people were encouraged to take their disputes to the newly instituted state courts. But this was not as straightforward as the colonial state might have initially anticipated. In the first decade of colonial rule in Punjab, the new laws and institutions proved either too unpopular (as in the case of the North West Frontier Province (NWFP), where *jirgah* or tribal councils held sway), or too popular, and thereby becoming inundated by the volume of litigation, especially in the Cis-Sutlej areas. The Cis-Sutlej area was first to witness a surge in the value of land as a result of the spread of irrigation. At the same time, growing and unprecedented levels of rural indebtedness gave rise to large-scale unregulated transfers of land, resulting in high volumes of litigation (Bhattacharya 1985; Islam 1995; Kapila 2003). Whilst there was complete non-recognition of the juridical authority of the state by the people in the NWFP, in the case of the Cis-Sutlej area, the state's inadequacies to deal with the consequences of its own policies and interventions were first revealed at the level of institutions. In order to tide over the crises of legitimacy as well as growing

litigiousness, panchayats were made legal in 1869 and were given the responsibility of adjudicating on local disputes.<sup>viii</sup> But the challenge posed by shared juridical authority did not go amiss and so, once again, in 1899 the colonial state de-recognised the judicial capacities and capabilities of the all such councils on grounds of their processual opacity and lack of moral integrity, thereby deepening the gulf between the domains of state law and prevailing cultural norms.<sup>ix</sup>

The government tried to address this gulf through a two-pronged solution. It first put in place resources to extend the state judicature to every locality. More entry-level courts in towns and qasbas were created in order to increase the reach of and access to the state judiciary. The expansion of the judiciary was accompanied by the appropriation of local jurisprudence within the state juridical regime. It also resulted in the recognition of panchayats as and where they existed, and allocating to them jurisdiction over certain kinds of affairs that were deemed 'customary'. This required clarifying and codifying what was meant by 'customary'. The incorporation of local jurisprudence within the state juridical framework led to the inscription and codification of local norms and practices in compendia of rules and regulations to be used by the state courts for jurisprudential reference (eg. Ellis 1917; Middleton 1919; Roe and Rattigan 1895; Tupper 1881).

In other parts of British India, such matters were the subject of personal law (i.e. governed by religious tenets). But the area that stretched from the North West Frontier Province to Delhi was recognised as a region where religious codes did not necessarily find resonance in the daily habits of people.

'The Punjab is unique in one particular respect [...]. The primary rule of Civil Judicature as to all the important personal relations and as to rights of property in land amongst the rural classes (who form the bulk of the population) is

Customary Law, and not, as elsewhere in India, the Hindu and the Muhammadan Laws, which here are of secondary importance, though these also have to be administered.”<sup>x</sup>

Since tribal, community and local rules were seen to have greater influence, the state found it necessary to systematise these local laws. There was great debate on whether the axis of variability of custom lay at the level of group or at the level of territory. In keeping with the ethnological imagination of the time, the locus of culture was seen to be territory and therefore district-wise manuals of customary law were compiled for the use as jurisprudential reference in the adjudication of disputes in courts (Bhattacharya 1996; Kapila 2003). These manuals remained in use until the Constitution came into force in 1950, following Independence.

In collecting and publishing several compendia of local customary law in Punjab, the state at once signaled the discrepancy and the distance between legal and cultural norms. Even more importantly, it abjured its responsibility in resolving this dissonance by separating out two distinct realms of influence. Whilst it [the colonial state] would hold juridical sway over matters of general interest and criminal activity, other matters that were deemed of “ordinary occurrence” (such as marriage, inheritance), were to be governed by people’s own rules – a convention that continued until Independence.<sup>xi</sup> The existence of parallel jurisdictions of state, religious and customary law made for opportunistic assumption of variable subject positions by Punjab litigants and typically, in colonial Punjab, people tended to litigate on the basis of the most expedient jurisdiction for their case. Whilst it is not possible to go over the details of the debates surrounding the recognition of custom by law in colonial Punjab here, suffice it to say that due to the fact that it was never formally codified but was ‘legally recognised’ for reference in courts, custom was never a stable category. In fact, it became ossified over

time not as a consequence of its inscription, but rather through repeated litigation and through the subsequent emergence of regional case-law (see Kapila 2003: Chapter 4). The colonial state thus addressed the question of culture in the region by first recognising it as custom, and contained its realm of influence by its incorporation within state law.

### **Non-recognition**

The relationship between law and culture changed once again when the Constitution coming into force after Independence, and particularly with the promulgation of the Hindu Marriage Act and the Hindu Succession Act in 1955 and 1956 respectively. All matters hitherto regarded as of “ordinary occurrence, or customary”, were brought under one single jurisdiction of an all-India law, in stark contrast to not just the prevailing norms but also prevailing jurisprudence. This move towards achieving legal universalism as an important strategy for nation-making, has been examined to some extent with respect to the debates surrounding the incommensurability between Uniform, Civil and Personal Codes (eg. Das 1997; Mody 2008). However, its effects on the structuring principles north Indian society has yet to receive any systematic attention – to which I now turn.

The Hindu Marriage Act of 1955 and the Hindu Succession Act of 1956 are a fragmentary and watered down version of a more radical and comprehensive Hindu Code Bill, the promulgation of which had caused much political and social upheaval.<sup>xiii</sup> The Bill emerged out of the recommendations of the Rau Committee set up in 1941, to review the Women’s Rights to Property Act of 1937, a controversial statute in its own days (Uberoi 2002). The two Acts were feared for the rupture they were potentially

going to cause within Hindu society. Most notably, whilst the Hindu Succession Act came to be opposed for its potential to alter the bond between brothers and sisters once the sister became a rightholder in her natal property (Nasiruddin 1949: 21), the Hindu Marriage Act was seen by some as merely as license for indiscriminate sexual activity and therefore as a threat to existing moral values (Chatterjee 1954) These and other capacities of the Acts to reform, reshape and reorder Hindu society are have been scrutinised by scholars for their role in the changed household composition (Uberoi 2002), the project of nationalism and developmentalism (Majumdar 2009: 206-238), and gender relations in postcolonial India (Kishwar: 1994; Majumdar 2009; Parasher 1992). Though these studies are diverse in emphasis and persuasion, they hold in common a sociological or a socio-historical reading of the Acts and their effects on Hindu society. Due to this, whilst they illuminate the changed nature of the Hindu household and the gendered character of nationalism and postcolonial development, they are unable to throw light on the structural features of their effects<sup>xiii</sup>. I suggest that shifting the vantage point from the sociological underpinnings and manifestations of these Acts to their entailed anthropology of kinship and personhood allows an aperture on the unexamined aspects of the relationship between law and culture in contemporary India.

As observed earlier, when the colonial state marked out a legally distinct sphere called the customary, it at once signalled the gap between cultural and legal norms, as well as its inability or disinclination to resolve the tension arising from this gap. The postcolonial life and status of this gap has been of a different order, in that it has remained mostly unacknowledged. It is noteworthy that the Constituent Assembly (the body responsible for drafting the Constitution for postcolonial India) did not consist of a

single member who was either mandated, or then advocated the recognition of customary and/or local laws, or indeed the Dharmashastras, or classical legal texts (Galanter 1972: 55). In staying close to the motto of 'Unity in Diversity', Constitutional law acknowledged the heterogeneity in matters of 'ordinary occurrence' by promulgating religion-based personal codes along with the homogenous All India civil code. The primary site of difference thus came to be religion and variability along the axis of locality did not find recognition within Constitutional jurisprudence. This not only meant the non-recognition of colonial customary laws but also the north-south divide in Hindu kinship rules (see Uberoi 2002).

The prevailing hope was that over time, familiarity with new legal institutions as well as new legal norms (laws) would end in the closing in of the gap and the emergence of a new legal consciousness which was more in consonance with the new ideals. This ostensibly non-interventionist approach was part of a more general disposition of optimism surrounding the fate of the postcolonial national community and the advent of modernity and was not restricted to the domestic realm. The then ten-year timeframe for reservations (or, positive discrimination), the non-enumeration of caste in successive censuses, the apathy of the political left towards matters of religion, are some prominent examples of the hopes vested in the promise of (state-driven) modernity on the one hand and of the salutary disregard of the culture-question on the other in independent India. It is this non-intervention and non-acknowledgement of the conditions created by the diluted Hindu Code Bill that can be seen as the genesis of the most recent battle between law and culture that khaps are currently waging, as the next section outlines.



### **Towards an anthropology of reform**

Gender and family relations are regarded as the major axes of reform that the Hindu Marriage Act of 1955 and the Hindu Succession Act of 1956 both by the lawmakers and in scholarship (Kishwar 1994; Majumdar 2009). By outlawing polygamy and by introducing the legal possibility of divorce amongst all Hindus, including upper caste men and women, the Hindu Marriage Act radically altered the legal legibility of the Hindu conjugal unit. But in terms of kinship, it was the Hindu Succession Act that was the more significant of the two. It gave primacy to the conjugal unit as opposed to the joint household composed of male collaterals in succession, and for the first time bestowed women with the right to inherit property as equal heirs – whether as wives or as daughters. As is evident, this was a completely new way of imagining not only how property and wealth were to be held, distributed and devolved in the family, but more significantly, how people must relate to one another within and outside kinship. These laws were formulated to usher in – as they did indeed – a new society underpinned by a firm belief in equity and equality, where gender and family relations needed to undergo radical reform. The sites of reform were not new per se, but what distinguished the Acts from similar efforts undertaken either by colonial officials or by anticolonial nationalists was the scale and scope of transformation entailed in them. These were not examples of piecemeal legislation targeted at isolated social practices (cf. sati, widow remarriage, age of consent, land alienation, etc), but were a very conscious and comprehensive rewriting of the grammar of relatedness in north Indian Hindu society.

The intent of these two Acts was not misplaced. But the rhetoric on which their promulgation was premised deeply influenced the nature of their unfolding in

subsequent years in at least two important ways, neither of which has been examined sufficiently in either public debate or indeed in scholarship. First, the Hindu Code Bill and the eventual two Acts gave the appearance of giving birth to a new coda to arrange matters of daily occurrence. This was not altogether a false appearance, for these were indeed new ways of imagining the working of the Hindu household. However, these Acts had indirectly drawn on classical texts, or at least on upper caste sensibilities (Kapila 2003; 2004; Uberoi 2002). The iteration of newness was understandable because asserting rupture with the past was rhetorically necessary to ensure the success of the reformist agenda. But rupture and its attendant rhetoric disallowed an explicit tackling of the culture question and in particular its relation to law, even in a germane moment like that presented by the debates surrounding the Hindu Code Bill. Secondly the state – and law by extension – did not have any discursive or political ground to articulate its disengagement from or disavowal of the culture question. This was because unlike the colonial state, independent India could hardly claim non-intervention on the ground of an ostensible sovereignty of the domestic sphere (cf. Chatterjee 1993). In the all-encompassing self-image of Unity in Diversity, there was no such aspect culture that could be disavowed as not one's own by the nation-state. To do so would imply an undermined sovereignty of the nation-state. Moreover, these new laws were couched less in the spirit of non-intervention and more in the belief in reform. Therefore, aspects of custom (and culture by extension) had to be either declared repugnant and/or outmoded and de-recognised (as in the case of polygamy), or had to be sidestepped altogether in non-acknowledgement and non-recognition. The notion of *reform* was key here, for it produced the Acts as the deliverance of the anticolonial agenda and could thus be deployed to battle the contrarians with unassailable legitimacy. As a result, culture begot a fudging in postcolonial law and both its content and its force, particularly in relation to law, were never explicitly dealt with or indeed resolved.

This non-acknowledgement and non-resolution of the gap between cultural and legal norms in domestic matters had a profound and a more fundamental effect in the following decades, the roots of which lay in the way the new generative grammar of the Hindu relatedness embedded in these two Acts. Whilst the Hindu Marriage Act reduced the conjugal unit to a monogamous one, the Hindu Succession Act reconfigured the principles and pattern of inheritance, and also re-imagined familial relations from the vantage point of the new heirs. The legal categories of kin produced in and through these Acts ('wife', 'son', 'sister', etc.) bore at best nominal resemblance to their cultural counterparts not least because in their transcription of kinship terminology, the prevalent descriptive kinship system was rendered into a classificatory system. The new laws failed to produce the complexity of relationality that is fundamental to kinship. These changes were not merely of academic import, especially when these new forms of sociality and society combined with prevailing dominant norms in the new structuration of north Indian society, the consequences were entirely unanticipated and went mostly unacknowledged, as explained below.

The models of the family and household inhered within the Acts were borrowed from their western counterparts bore a deep agnatic bias. The motor of Hindu society on the other hand is primarily driven by alliance rather than descent. Much of the work of culture and society in India revolves around a horizontal axis rather than a vertical one – arranging marriages, keeping and marking ritual distance, etc. Marriage is not only the central feature of kinship structures in India but the very nature of this work is intimately connected to the production of the principles of caste hierarchy. As Louis Dumont writes, 'Marriage dominates the Hindu's social life, and plays a large part in his

religion [...] It is the most prestigious family ceremony, and at various social levels constitutes the main occasion on which the greatest number of members of the caste and persons gather together [...] By its nature, marriage constitutes to a large measure the link between the domain of caste and that of kinship [...]’ (Dumont 2009: 109-110). Thus, in north India the production of kinship and hierarchy are intimately linked. Furthermore, as Dumont remarks elsewhere, in north India the twin interdictions against the reversal in the direction of exchange of women and secondly against patrilateral cross-cousin marriage are logical elaboration of the wider principles of caste hierarchy: ‘Caste [ ] invades the sphere of kinship in such a way that we cannot speak with any rigour of a ‘kinship system’ as such. [...] The hypergamous model replaces a kinship element and allows the whole to keep a similar form’ (Dumont 1993:100). For these reasons, it is impossible to disentangle the structures of kinship from those of caste in north India, and any reform aimed at one will have implications for the other. So it was in the case of the Hindu Code Bill and its derivative Acts. Based in the commitment to the wider principle of equality underpinning the Constitution, the Hindu Succession Act and the Hindu Marriage Act had a deep effect on not just the structure of north Indian kinship but on its very foundational principles. In making the newly narrowed conjugal unit and its direct descendants as primary heirs to property and bestowing them with ownership of hitherto unavailable equal dispositional rights, the Hindu Marriage Act and the Hindu Succession Act altered the principles of relationality in north India, and at once reversed the motor of Indian society. In their unfolding, the two Acts grammatically altered north Indian kinship from descriptive to classificatory, and shifted its motor from alliance and placed a hitherto unprecedented weight on descent. The clue to these shifts is to be found in a number of changes that have taken place in north India and are sometimes all too hastily explained away under bulky rubrics like modernity, globalization, sanskritisation, etc. The effects of this shift,

coupled with the fact that it went largely unacknowledged and unarticulated, are altogether profound – and as in the case of khaps, violent, as the next section elaborates.

### **Khaps and the clatter of culture**

Let us remind ourselves of what is at issue as far as the khaps or caste councils are concerned. In the main, khaps have increasingly gained force by issuing retributory diktats against 'bad' or mis-marriages (inter-caste, endogamous, intra-local), none of which is an invalid form of marriage in the eyes of the law. In addition, these councils of patriarchs have petitioned the Indian state to amend the Hindu Marriage Act to reflect their demands. What has posed as a special challenge to the state is their growing popular and political influence and the perpetration of violence at their behest. Let us also remind ourselves about the region where khap panchayats are most influential and where the rate of the so-called honour-killings is on the increase. The region comprises mainly of Haryana, western Uttar Pradesh and Delhi has been marked by at least two distinct waves of affluence in the last fifty years, both of which are tied to the increased value of land.<sup>xiv</sup> In the first instance, the region was amongst the primary and significant beneficiaries of the Green Revolution in the 1950s-60's that saw an unprecedented growth in the rural economy of the area, and a section of the rural population flushed with new wealth. Commentators have elaborated on the relationship between economic growth and new sociological developments, in particular the dwindling sex-ratio in the region, which currently stands at 850 girls for every 1000 boys (Kaur 2010; Khanna 2010).<sup>xv</sup> The rise of khap violence is thus also sometimes attributed to the paucity of young women in the region of marriageable age (Kaur 2010). However, neither the adverse sex ratio nor the phenomenon of a large proportion of young men of marriageable age being unmarried in the region is an entirely recent development and

that both these features of north Indian society are linked to the rising value of land and the rising political power of landowners (Chowdhry 2007: 253-54). I want to suggest that although very important, political economy alone cannot explain the rising influence of khaps being witnessed today. The changes taking place in the structuring of north Indian kinship need to be paid attention to.

The reversal of the motor of society from alliance to descent has had a profound effect in this area. The work of society has shifted, in that there is a new emphasis placed on descent as opposed to alliance. This does not imply that the work of alliance has been altogether abandoned, but that social institutions and efforts are now geared more towards achieving the objective of producing descent rather than alliance. Thus, from arranging marriages (or circulating women) as a motor of moving society forward, increasing its thickness and intensifying the density of relations, the new laws have managed to engender a recalibration of this effort so that the focus is heavily weighed in favour of producing heirs (or in other words descendants). As a result, social value is no longer being produced simply in and through establishing, or reinforcing horizontal networks of alliance, but is now being contested, if not superseded by its production along the vertical axis of descent. The evidence is most clear from the key shift in this area, where the region's well-established male-child preference has achieved an ever sharper edge in the preceding decades (John et al 2011).<sup>xvi</sup> The need to produce male heirs has now achieved almost an unprecedented level of autonomy so that it has become a goal in itself. Social and reproductive technologies have aided in freeing it from the conjugal complex. And even though the Hindu Succession Act produces sons and daughters as equal heirs or descendants, these technologies along with the policy

imperative of the two-children norm have combined only to further the dominance of male child preference (Kaur 2010; Khanna 2010).

But what is interesting and to an extent remains unaccounted for is that the scarcity of women in the event of the lowered sex-ratio has not yielded a change (if not reversal) in the traffic and direction of marriage payments, as it might have been hoped, if not presumed. Rather, in a bizarre development, two forms of marriage have resurfaced after nearly a century – marriage by abduction/capture, and child marriage. The former development, or marriage by abduction is now nearly a decade old, and technically not really a marriage, in that it is contractual ‘renting’ of the womb of women abducted from places as far as Bangladesh for the explicit purpose of producing a male heir, whose services are most likely to be terminated once the mission is accomplished (Kaur 2004). The abductee has no rights in that household beyond the agreed payment for childbirth. Child marriage, on the other hand, is being touted by khap patriarchs and even by some social services as a preferred solution to producing the right kind of male heirs as well as the solution to keeping the circulation of young women in control (Siwach 2010).<sup>xvii</sup> In this complex, the paucity of women in the community, which should have led to an increase in their value, a change some may have hoped for, and possibly an eventual reversal in the direction of marriage payments, is near impossible to come into being. In the end, gender – that much vaunted axis of reform and the vector of domestic equality enshrined in the Hindu Code Bill and the subsequent Marriage and Succession Acts, does not, and dare I say cannot and will not correct its imbalance in the long run. The reason for this lies in the way social reform and its axes were envisaged in law and the Hindu Code Bill in particular, as the next section makes clear.

### **A theft of rights**

In discussing the relationship between law and culture thus far, I have addressed some of the strategies and conditions through and under which culture and cultural practices have challenged the legitimacy of Indian state law in recent times. If community patriarchs have found culture as a conduit to assert their political and social clout by taking on the law, or demonstrating its alien qualities, then in this war of attrition, law on its part has reasserted its position as being a prosthetic extension of the paternalistic Indian state. In such a self-positioning, law becomes, and presents itself as, not just an arbiter or guarantor, but also as the provider of all those things that culture could not or did not provide. Chief amongst these are rights of equity and equality, hitherto unavailable to the citizenry, at least in and through culture. In doing so, law becomes a critical medium through which the framework of rights becomes the lingua franca for comprehending not just the political but social life as well. But as Marilyn Strathern has cautioned us, it is imperative to de-naturalise the language of rights, for, '[a] vocabulary that turns on the deprivation of 'rights' must entail premises about a specific form of property. To assert rights against others implies a sense of legal ownership' (Strathern 1988: 142). Even though Strathern's warning came against certain Marxist-feminist readings of gender relations in Melanesia and specifically with regard to the question of ownership of the product of one's labour, it is nevertheless salutary in understanding the persistent incommensurability between law and culture and why at this point in time and in this particular matter the two end up talking past each other.

Imputed in the framing of itself as the provider of all that which is lacking elsewhere is by necessity a restrictive constitution of all other sources of social and political life. Seen from the eyes of the law, culture in this all-too powerful framework, then becomes



a restriction, one that constrains people from realising the full potential of rights and liberties conferred in and through citizenship. Speaking within this framework or in its support, sixty years after the Constitution first came into force, at such moments of serious challenge from the other side, law and its liberal defendants, wittingly or unwittingly, position culture as a *thief*, as one that takes away from society all that which law has bestowed. In a neat reversal, law becomes the giver of the gift of rights to its citizens, and culture becomes the thief or the misappropriator. If we locate 'theft' in the realm of exchange, then it sits at odds with 'gift', in fact almost in opposition to it. Gifts propel exchange. But, in as much as exchange is written into the gift, so is the greyness of ownership.<sup>xviii</sup> Theft, on the other hand, disrupts exchange, calls a halt to it, and momentarily disturbs the logic of flow, precisely because it disputes and appropriates ownership – not through a process of exchange (whether equal, reciprocal, or asymmetric), but by its disruption, its end. It seeks to end the greyness of ownership to bring it within the realm of black and white clarity. The theft of rights then is the greatest crime committed by culture, for it stops certain forms of symbolic exchange – in this case of rights and obligations between the citizen and the state to continue, or even come into being at all. But what kind of theft, if any does law commit on culture?

It is here that Strathern's caution comes to bear upon the argument. To talk of rights that law has bestowed and which subsequently culture takes away in the event of efficacious khap violence is to first aver to the existence of those rights in the first place and the location of these rights in the form of legal ownership of people have in themselves and with regard to other people. It is when the edifice of rights-talk is spliced apart at this angle that the consequences of the original non-acknowledgement of culture by law become evident. Indian law recognises culture and cultural difference

in very particular forms. The greatest acknowledgement of cultural difference recognised and defended by the Indian Constitution is at the level of religion and the existence of the various Personal Codes (Hindu, Muslim, Christian) are proclaimed as testimony to the defense of difference by law in India (Bajpai 2010; Bhargava 1998). It is another matter that its impetus is derived not so much from the recognition of difference but from the Constitutional guarantee the right to equality. But what needs to be underscored in the Constitutional guarantee of Personal Codes is the swift and sealed conclusion that the recognition of difference has been completed or is complete in this one step. The optic of spirit-level that pervades the Indian legal imagination deems that anything that is different can and must always be seen as that which needs to be brought up to that level playing field (Chakrabarty 2002: 90). For example, in the landmark overturning in 2009 of Article 377 of the Indian Penal Code that criminalized homosexuality since colonial times, the judgement was based on the defense of legal minorities - in this case sexual minorities, rather than on a right to difference per se.<sup>xix</sup> This numerical and statistical idiom of equality in Indian law is well-noted (Bajpai 2011; Bhargava 1998; Chakrabarty 2002). What remains undertheorised is its monadic, as opposed to the relational calculus of subjectivity. As in case of the HSA and the HMA, the law purports to suffuse the individual with rights (and obligations) but does so in a unitary or atomistic fashion so that it is the event or the moment of becoming or unbecoming that kind of person (wife, heir, daughter, widower, divorcee) that becomes the focus of juridical attention and elaboration, leeching away from it the complexity entailed in the relation per se. The husband-wife relation, for example, is not just a relationship between the man and the woman, but also encompasses and is embedded within an array of relations that go beyond the two individuals concerned. It includes and is constituted by the 'obligations entailed in having kinfolk' (Strathern 2004: 208). In other words, composite or dividual personhood cannot be acknowledged or

reproduced through the Hindu Marriage Act and the Hindu Succession Act, not least because like Marshall Sahlins, law in India categorises dividual personhood as 'pre-modern' (Sahlins 2011: 13). The subjects of the Hindu Marriage Act and Succession Act are monadic individuals, rather than a 'composite site of social relations' (Strathern 1988:13). This discrepancy between legal subjectivity and culturally defined kin category also explains why individuals opportunistically assume expeditious (or liberal) subject positions as litigants and revert to cultural type before and after court appearances, or decision-events, as Humphrey (2008: 368) calls them, especially in the case of family disputes (Kapila 2004; Mir Husseini 2000). But it also throws light on why sixty years after these laws were first enacted and equality of status guaranteed as a fundamental right under the Indian Constitution, sociological axes of difference (eg. gender) remain mostly undisturbed beyond their formal lives, especially in the domain of kinship. The adverse sex-ratio and its expanding territory of influence, as recently pointed out by John (2011), is but only one concrete manifestation of this discrepancy.

### **In conclusion**

In commonplace and some scholarly understandings of the conflict between law and culture, culture is routinely positioned as a constraining influence, as taking away from people what law has bestowed on them, or inhibiting their access to these gifts. The public aspirations of law, especially in the case of India, prevent a routine interrogation of its countervailing force because these aspirations are inherently formulated in the future tense. The promise of equality for all in an underdetermined notion of the future therefore presents itself as a powerful, and for most part incontrovertible proposition, whose attraction few can deny in a milieu overdetermined by hierarchy.

In fact, it is often the functioning, or "implementation", of law rather than its content and force, that usually comes for criticism. Injustice too is not seen to issue forth from the

nature of the law itself (Derrida 1990) but from the indolence or slovenliness of its executors. Only in the event of an explicit challenge fielded by representatives of cultural norms, for example in the famous case of Shah Bano,<sup>xx</sup> or indeed in the current round of khap inspired violence, is the public aspirations of law tentatively superseded by the question mark placed on the force of law in Indian society. Khaps appear doubly restrictive in this context: neither are they democratic, that is, based in equality, nor do they defend it. Moreover, their emancipatory potential and epistemological status is undermined by the fact that cultural norms are not seen to be products of systematic expertise in the way law is, and neither are there recognizable professions attached to them (Galanter 1972: 61).

But it is when we turn the argument on its head that the restrictions placed by law on culture reveal themselves in two forms: one is the ways in which very particular forms of subjectivity find recognition in law, and secondly how its monadic calculus pares down relationality. The narrow field of vision for recognition and the politics it gives birth to is well noted in scholarship on indigenous communities. Elizabeth Povinelli amongst others has discussed at length the 'gridlocking' of indigenous bodies and culture by the Australian state on two levels: one, the bestowing recognition only on the so-called non-repugnant indigenous cultural practices, and secondly the bestowing of legal recognition only on those that can be demonstrated to have an unbroken continuity with the past (Povinelli 2006: 227; See also Clifford 1988). Indigenous communities, on their part have been noted to draw on culture as an expedient 'resource' in order to gain recognition from the state (Yudice 2003: 19). But what we have in the case of the law in India is a very different kind of gridlocking, where culture is rendered anything but expedient. Law is premised on the *rupture* with the past and therefore any continuity with the past is precisely what law cannot address or

recognize, especially in matters of “ordinary occurrence”. In order to redescribe and gain any purchase on the relationship between law and culture we will therefore need to address both sets of constraints. We will need to address the reasons not for the conflict between law and culture but following Derrida for their incommensurability that gives the appearance of hostility (Derrida 1990: 951). And for that, we will need to examine culture seriously and not just expediently – that is, neither as a resource, nor as gridlock.

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<sup>i</sup> No 459-S. National Archives of India (NAI)/Home/Judicial Proceedings/October 1901/No. 6/p. 91

<sup>ii</sup> <http://www.thehindu.com/news/national/article396373.ece>. Accessed on 09.11.2010

<sup>iii</sup> The list is too vast to cite.

<sup>iv</sup> On First Nations see Borrows 2010; On Aborigine rights in Australia, see Povinelli 2003.

<sup>v</sup> On veiling, see Scott 2008; Sunder 2003. On the fatwa, see Asad 1993

<sup>vi</sup> . As one of the earliest commentaries on the new Constitution remarks: ‘The democratic features of the Constitution were as risk-taking as the unity features were cautious. Representative government with adult suffrage, a bill of rights providing for equality and personal liberty, were to become the spiritual and institutional bases of a new society – one replacing the traditional hierarchies and its repressions’ (Austin 1999 [1966]: x)

<sup>vii</sup> NAI/ Home/ Judicial/ A Proceedings/ 25 March 1871/no. 40.

<sup>viii</sup> NAI/ Home/ Judicial/ A Proceedings/ October 1901/ no. 5

<sup>ix</sup> NAI/ Home/ Judicial/ A Proceedings/ October 1901/ no. 5

<sup>x</sup> Memorandum by Sir Meredith Plowden, Senior Judge of the Chief Court of the Punjab, to the Chief Secretary to the Government of Punjab. Letter no. 1334, dated Lahore, 24<sup>th</sup> October 1893. NAI/Home/Judicial/A Proceedings/ March 1895/no 385.

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<sup>xi</sup> Partha Chatterjee (1993) amongst others has read this separating out of the realm of culture from law as a fine example of the annexation of the domestic, or the internal world by the nationalists as sovereign, a view that has since become refined (Birla 2009; Kapila 2004).

<sup>xii</sup> They were only passed once the demand for BR Ambedkar's resignation, the architect of the Indian Constitution, had been met. Amongst those who vehemently opposed the Code was the first President of India, Dr Rajendra Prasad.

<sup>xiii</sup> Uberoi 2002 is an exception in examining the status of Dravidian kinship rules in the two Acts.

<sup>xiv</sup> For a transformation of the region in the colonial period see Datta (1999). For the effects of these transformation on women in the region see Chowdhry (1995)

<sup>xv</sup> The sex-ratio improved marginally from the 2001 figure of 801 to 850 in 2011, but was still well below the national average of 933.

<sup>xvi</sup> John (2011) further notes that whilst the ration has marginally improved in the north Indian states in the current census, there has been a surprising decline in the same in central and eastern India, which do not tend to have a male child preference historically.

<sup>xvii</sup> Siwach, Sukhbir 'In Jatland, child marriages to prevent girls from eloping' June 26, 2010 *Times of India*.

<sup>xviii</sup> The literature on the gift and the 'hau' of the gift is too vast to cite.

<sup>xix</sup> 160 Delhi Times 277.



<sup>xx</sup> Briefly, Shah Bano, Muslim a 62 year old and immiserated divorcee, was awarded maintenance by the Supreme Court under Section 125 of the IPC that des not discrimnate on the grounds of caste or religion. The judgement was based on the Constitutional principle of equality, and was strongly opposed by the Muslim clergy as it contravened the rights of a divorced woman in the Muslim Personal Code. Ultimately, the then government felt forced to rescind the Court order and revert the petitioner to her 'cultural category'. For a discussion on the case and its consequences, see Das (1997)